

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

WANDA REAGEN, an individual,

Plaintiff,

v.

AURORA LOAN SERVICES, INC., et  
al.,

Defendants.

1:09-CV-00839-OWW-DLB

MEMORANDUM DECISION RE:  
DEFENDANT AURORA LOAN  
SERVICES, INC.'S MOTION TO  
DISMISS PLAINTIFF'S COMPLAINT  
(Doc. 8)

I. INTRODUCTION

Before the court for decision is Defendant Aurora Loan Services, Inc.'s ("Aurora") motion to dismiss Plaintiff Wanda Reagen's Complaint for failure to state a claim. Plaintiff, who entered into an "Adjustable Rate Note" loan agreement, brings this suit against Aurora, Aegis Wholesale Corporation ("Aegis"), and Capital Line Financial, LLC ("Capital Line") for violations of law related to disclosures about the loan.<sup>1</sup> Specifically, the Complaint alleges violations of the Truth in Lending Act, 15 U.S.C. § 1601 et seq., and California's Unfair Business Practices Act, as well as financial elder abuse. Defendant Aurora moves to dismiss the Complaint in its entirety.

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<sup>1</sup> Plaintiff refinanced the mortgage on her home (the "property"), located at 811 Augusta Hills Drive, Bakersfield, California. (Compl. ¶ 8.)

1                                   **II. FACTUAL BACKGROUND**

2           On May 12, 2006, Plaintiff refinanced her existing home loan  
3 and entered into an "Adjustable Rate Note" agreement with  
4 Defendants Aegis and Capital Line, the loan originator and broker.  
5 (Compl. ¶ 8.) Plaintiff alleges that Defendant Aurora purchased  
6 the loan after the transaction was complete, with full knowledge  
7 that it was a "negative amortization loan" containing patent  
8 disclosure violations. (Id. ¶ 12.)

9           Plaintiff alleges that Capital Line promised a loan with low  
10 interest payments and substantially lower monthly payments, but was  
11 in fact charged with a loan "designed to allow lenders and mortgage  
12 brokers to deceive consumers." (Id. ¶ 10-11.) According to the  
13 Complaint, Capital Line and Aegis qualified Plaintiff for a  
14 negative amortization loan, but neither explained nor provided  
15 adequate disclosures on the negative amortization feature. (Id.)  
16 Plaintiff claims that the "statement provided to Plaintiff reveals  
17 that the loan contains a variable rate feature but makes no mention  
18 that the loan will negatively amortize." The Complaint further  
19 alleges:

20           Plaintiff made it clear that she would not be able to  
21 make the minimum payment. Defendant Capital Line  
22 assured Mrs. Reagen that she could do so without  
23 consequence. Predictably, Plaintiff was confused and  
24 alarmed when she discovered that by making the minimum  
25 payment, interest was deferred and the principal  
26 balance had increased. Negatively Amortized loans put  
27 borrowers at a higher risk of default as negative  
28 equity is generated through minimum payments. For  
this reason, most consumers are unaware or do not  
fully understand the impact of the loan terms in  
negatively amortized loan. Mrs. Reagen is a victim of  
this misleading business practice.

(Id. ¶ 10.)

Plaintiff's suit primarily challenges the disclosures that

were provided with the loan. In particular, Plaintiff alleges that the disclosures related to negative amortization were misleading and unclear. The "Adjustable Rate Note" provided that, in return for the loan, Plaintiff promised to pay a principal of \$360,000. (Id., Ex. 1, ¶ 1.) The principal amount might increase as provided in the Note, but would never exceed 115% of the principal amount Plaintiff originally borrowed. With respect to interest rate, the loan provided:

(A) Interest Rate

Interest will be charged on unpaid Principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 1.750%. The interest rate I will pay may change....

(B) Interest Rate Change Date

The interest rate I will pay may change on the first day of July, 2006, and on that day every month thereafter. Each date on which my interest rate could change is called an 'Interest Rate Change Date.' ... The interest rate may change monthly, but the monthly payment is recalculated in accordance with Section 3.

(C) Index

Beginning with the first Interest Rate Change Date, my adjustable interest rate will be based on an Index....

(D) Calculation of Interest Rate Changes

Before each Interest Rate Change Date, the Note Holder will calculate my new interest rate by adding THREE and 45/100 percentage point(s) (3.450%) ('Margin') to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). This rounded amount will be my new interest rate until the next Interest Rate Change Date. My interest rate will never be greater than 9.9500 %. Beginning with the first Interest Rate Change Date, my interest rate will never be lower than the Margin.

(Id., Ex. 1, ¶ 2.)

The Note provides a number of terms with respect to monthly

1 payments, that the initial minimum monthly payments until the first  
2 Payment Change Date would be in the amount of \$1,286.08 unless  
3 adjusted under Section 3(F). (Id. Ex. 1, ¶ 3(B).) The Note  
4 discloses that this monthly payment may change as required by  
5 Section 3(D) beginning on the first day of July 2007 and on that  
6 day every 12th month thereafter. Additionally, the payment would  
7 change any time Sections 3(F) or 3(G) required Plaintiffs to pay a  
8 different monthly amount. (Id. Ex. 1, ¶ 3(C).)

9 Paragraph 3(D) explains the calculation of monthly payments.  
10 It provides that, unless 3(F) or 3(G) applies, the amount of a new  
11 monthly payment effective on a payment change date would not  
12 increase by more than 7.5% of the prior monthly payment. This  
13 limit was known as the "Payment Cap." Id. Ex. 1, ¶ 3(D). Unless  
14 3(F) or 3(G) requires payment of a different amount, the new  
15 minimum payment would be the lesser of (1) the amount provided by  
16 the "Payment Cap" and (2) the amount sufficient to repay the unpaid  
17 Principal that Plaintiffs are expected to owe at the Payment Change  
18 Date in full on the maturity date in substantially equal payments,  
19 also known as the "Full Payment." (Id.)

20 Paragraph 3(G) provides that Full Payment was required as the  
21 Minimum Payment on the tenth Payment Change Date and each  
22 succeeding fifth Payment Change Date, until the monthly payment  
23 changed again. Id. Ex. 1, ¶ 3(G). Paragraph 3(F) provides, in  
24 effect, that once the unpaid Principal reaches the Maximum Limit  
25 (115% of the originally-borrowed Principal), Plaintiffs were  
26 required to pay the Full Payment amount as the Minimum Monthly  
27 Payment. (Id. Ex. 1, ¶ 3(F).) Additionally, after the first  
28 Interest Rate Change Date, the lender could provide Plaintiffs with

up to three additional payment options greater than the Minimum Payment: an interest-only payment, a fully amortized payment, and a 15-year amortized payment. (Id. Ex. 1, ¶ 3(H).)

The note also discloses how the unpaid Principal might increase:

Since my monthly payment amount changes less frequently than the interest rate, and since the monthly payment is subject to the payment limitations discussed in Section 3(D), my Minimum Payment could be less than or greater than the amount of the interest portion of the monthly payment that would be sufficient to repay the unpaid Principal I owe at the monthly payment date in full on the Maturity Date in substantially equal payments. For each month that my monthly payment is less than the interest portion, the Note Holder will subtract the amount of my monthly payment from the amount of the interest portion, and will add the difference to my unpaid Principal[.]

(Id. Ex. 1, ¶ 3(E).)

Additionally, a "Disclosure Statement" in Plaintiff's Loan Origination File explains:

You will have the choice each month of paying the lesser of the two payments, and if the limited payment is less than the full payment, you can choose to pay more than the limited payment up to and including the full payment for your monthly payment. If you pay an amount less than the full payment that would not be sufficient to cover the interest due, the difference will be added to your loan amount. This means that the balance of your loan could increase. This is known as 'negative amortization.'

(Request for Judicial Notice ("RJN"), Doc. 10, Ex. 5.<sup>2</sup>)

The loan's "Truth In Lending Disclosure Statement" ("TILDS") stated that the Annual Percentage Rate, "the cost of your credit as a yearly rate," was 7.561%. (Id. Ex. 2.) The Payment Schedule

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<sup>2</sup> Plaintiff's request for judicial notice of this document was GRANTED. See § IV(B), *infra*.

provided for 12 payments at \$1,286.08 due beginning July 1, 2006; 12 payments at \$1,382.54 due beginning July 1, 2007; 12 payments at \$1,486.23 due beginning July 1, 2008; 12 payments at \$1,597.70 due beginning July 1, 2009; 9 payments at \$1,717.53 due beginning July 1, 2010; 302 payments at \$3,080.08 due beginning April 1, 2011; and a final payment of \$3,080.00 due on June 1, 2036. (Id.)

### III. PROCEDURAL BACKGROUND

On May 11, 2009, Plaintiff filed the instant action, alleging three causes of action: (1) Violation of Truth in Lending Act ("TILA"), 15 U.S.C. § 1635(a); (2) Unlawful and Unfair Business Practices in Violation of California Business & Professions Code § 17200; and (3) Financial Elder Abuse in Violation of California Welfare and Institutions Code § 15610.30.

Plaintiff primarily seeks rescission of the "consumer credit transaction" under TILA. Plaintiff also seeks injunctive relief, statutory damages, and restitution of all monies unlawfully obtained from her. (Id. at 10:6-10:17.)

On August 12, 2009, Aurora filed this motion to dismiss Plaintiff's complaint. Aurora asserts that Plaintiff's suit should be dismissed with prejudice because the type of claims alleged are targeted "at the original lender - which was not Aurora." In any event, Aurora claims that Plaintiff is not entitled to rescind the loan agreement and has no basis to pursue a claim under Cal. Bus. & Prof. Code § 17200 or for financial elder abuse.

Plaintiff filed her opposition on October 19, 2009, arguing that she is entitled to rescission because she "was given a defective Truth in Lending Disclosure Statement, in direct

1 contravention of the Federal Truth in Lending Act.”<sup>3</sup> Plaintiff  
2 also argues that her “UCL Claim” is not precluded and she has  
3 sufficiently pled a financial elder abuse cause of action.

#### 4 5 **IV. LEGAL STANDARD**

##### 6 **A. Motion to Dismiss**

7 Under Federal Rule of Civil Procedure 12(b)(6), a motion to  
8 dismiss can be made and granted when the complaint fails “to state  
9 a claim upon which relief can be granted.” Dismissal under Rule  
10 12(b)(6) is appropriate where the complaint lacks a cognizable  
11 legal theory or sufficient facts to support a cognizable legal  
12 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th  
13 Cir.1990).

14 To sufficiently state a claim for relief and survive a  
15 12(b)(6) motion, a complaint “does not need detailed factual  
16 allegations” but the “[f]actual allegations must be enough to raise  
17 a right to relief above the speculative level.” *Bell Atl. Corp. v.*  
18 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).  
19 Mere “labels and conclusions” or a “formulaic recitation of the  
20 elements of a cause of action will not do.” *Id.* Rather, there must  
21 be “enough facts to state a claim to relief that is plausible on  
22 its face.” *Id.* at 570. In other words, “[t]o survive a motion to  
23 dismiss, a complaint must contain sufficient factual matter,  
24 accepted as true, to state a claim to relief that is plausible on  
25 its face.” *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937, 1949,

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27  
28 <sup>3</sup> Plaintiff’s opposition did not comply with Eastern District  
Local Rules 5-133(a) & (d)(3). (See Doc. 14.)

1 173 L.Ed.2d 868 (2009) (internal quotation marks omitted). "The  
2 plausibility standard is not akin to a probability requirement, but  
3 it asks for more than a sheer possibility that a defendant has  
4 acted unlawfully. Where a complaint pleads facts that are merely  
5 consistent with a defendant's liability, it stops short of the line  
6 between possibility and plausibility of entitlement to relief."  
7 *Id.* (internal citation and quotation marks omitted).

8 In deciding whether to grant a motion to dismiss, the court  
9 must accept as true all "well-pleaded factual allegations." *Iqbal*,  
10 129 S.Ct. at 1950. A court is not, however, "required to accept as  
11 true allegations that are merely conclusory, unwarranted deductions  
12 of fact, or unreasonable inferences." *Sprewell v. Golden State*  
13 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); see, e.g., *Doe I v.*  
14 *Wal-Mart Stores, Inc.*, 572 F.3d 677, 683 (9th Cir. 2009)  
15 ("Plaintiffs' general statement that Wal-Mart exercised control  
16 over their day-to-day employment is a conclusion, not a factual  
17 allegation stated with any specificity. We need not accept  
18 Plaintiffs' unwarranted conclusion in reviewing a motion to  
19 dismiss.").

20 The Ninth Circuit has summarized the governing standard, in  
21 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint  
22 to survive a motion to dismiss, the non-conclusory factual content,  
23 and reasonable inferences from that content, must be plausibly  
24 suggestive of a claim entitling the plaintiff to relief." *Moss v.*  
25 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal  
26 quotation marks omitted).

27  
28 **B. Defendant's Request For Judicial Notice**



1 In connection with its motion to dismiss, Defendant Aurora  
2 submitted a request for judicial notice pursuant to Fed. R. Evid.  
3 201: (1) Deed of Trust (including an Adjustable Rate Rider),  
4 recorded on May 24, 2006, in the Official Records of Kern County,  
5 California; (2) Deed of Trust of Plaintiff's prior loan, recorded  
6 on October 28, 2003, in the Official Records of Kern County,  
7 California; (3) HUD-1 Statement showing that Plaintiff received  
8 over \$235,000 in cash from Aegis Wholesale Loan; (4) Plaintiff's  
9 note to her lender stating that she refinanced in order to  
10 "complete some home improvement jobs and invest;" and (5) Program  
11 Disclosure signed by Plaintiff demonstrating that she received the  
12 negative amortization disclosure ("ARM Disclosure"). Plaintiff  
13 opposes the request as to documents (2)-(5), arguing that "these  
14 documents are not mentioned or even alluded to in the Complaint."

15 A court generally may not consider matters beyond the  
16 pleadings on a Rule 12(b)(6) motion, but "a document is not outside  
17 the complaint if the complaint specifically refers to the document  
18 and if its authenticity is not questioned." *Branch v. Tunnell*, 14  
19 F.3d 449, 453 (9th Cir. 1994), *overruled on other grounds by*  
20 *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).  
21 In connection with the loan transaction at issue, Plaintiff  
22 executed an Adjustable Rate Note, Adjustable Rate Rider ("Rider"),  
23 Deed of Trust, Truth in Lending Disclosure Statement, and ARM  
24 Disclosure. Only the Note and the TILDS are attached to the  
25 Complaint. Defendant provides the Deed of Trust, Rider, and ARM  
26 Disclosure in connection with their motion to dismiss. These  
27 documents are properly considered as they make up the complete set  
28 of documents comprising the loan transaction, which is referenced

1 extensively in the Complaint. See *In re Stac Elcs. Sec. Litig.*, 89  
2 F.3d 1399, 1405 n.4 (9th Cir. 1996) (noting that complete copies of  
3 documents whose contents are alleged in the complaint may be  
4 considered in connection with a motion to dismiss pursuant to  
5 Fed.R.Civ.P. 12(b)(6)). Defendant's request is GRANTED as to the  
6 Deed of Trust and Adjustable Rate Rider (RJN # 1), as well as the  
7 ARM Disclosure (RJN # 5).

8 Plaintiff's prior Deed of Trust (RJN # 2), the HUD-1 Statement  
9 (RJN # 3,) and Plaintiff's note to her lender (RJN # 4) have no  
10 bearing on the disposition of the instant motion. Defendant's  
11 request as to these documents is DENIED.

## 12 13 **V. DISCUSSION**

### 14 **A. Rescission under TILA (Count I)**

15 In her first cause of action, Plaintiff alleges that the  
16 loan's Truth in Lending Act Disclosure statement failed to reveal  
17 that the loan would negatively amortize, in contravention of TILA.  
18 Plaintiff adds that "other disclosures in the loan documentation  
19 make it unclear that Negative Amortization will occur," and claims  
20 that the Note misleadingly states that the Interest Rate "has the  
21 possibility of increasing," when in reality "it is assured that  
22 this rate will increase." (Compl. ¶ 11.) According to Plaintiff,  
23 these deficiencies entitle her to rescind the loan under 15 U.S.C.  
24 § 1635.

25 Aurora rejoins that Plaintiff's "reading of TILA is simply  
26 wrong." Aurora argues that the alleged failure to adequately  
27 disclose the risk of negative amortization is not a "material"  
28 disclosure for purposes of extending the three-year statute of

1 limitations for rescission. According to Aurora, Plaintiff  
2 received sufficient disclosures on the variable rate features of  
3 her loan, which are the only "material disclosures" under TILA.<sup>4</sup>

4 The stated purpose of TILA is "to assure a meaningful  
5 disclosure of credit terms so that the consumer will be able to  
6 compare more readily the various credit terms available to him and  
7 avoid the uninformed use of credit, and to protect the consumer  
8 against inaccurate and unfair credit billing and credit card  
9 practices." 15 U.S.C. § 1601(a). "To effectuate TILA's purpose,  
10 a court must construe the Act's provisions liberally in favor of  
11 the consumer and require absolute compliance by creditors." *Hauk*  
12 *v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1118 (9th Cir. 2009)  
13 (internal quotation omitted). Congress delegated the  
14 responsibility of "prescrib[ing] regulations to carry out the  
15 purposes of" TILA to the Federal Reserve Board. 15 U.S.C. §  
16 1604(a). In response to this mandate, the Federal Reserve Board  
17 promulgated "Regulation Z," 12 C.F.R. § 226; it also published its  
18 interpretation of Regulation Z in the "Official Staff  
19 Interpretation," 12 C.F.R. pt. 226 Supp. I ("the Commentary").  
20 Courts must defer to the Board's interpretation of TILA unless that  
21 interpretation is obviously contrary to the statute. *Hauk*, 552  
22 F.3d at 1118.

23 Generally, TILA provides that borrowers have until midnight of  
24 the third business day following the consummation of a loan  
25 transaction to rescind the transaction. 15 U.S.C. § 1635(a). A  
26

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27 <sup>4</sup> Plaintiff does not address these arguments in her  
28 opposition, arguing only that the disclosures were "misleading."

1 borrower's right of rescission is extended from three days to three  
2 years if the lender (1) fails to provide notice of the borrower's  
3 right of rescission or (2) fails to make a material disclosure. 12  
4 C.F.R. § 226.23(a)(3). In this case, Plaintiff does not contend  
5 that Aurora failed to provide notice of her right of rescission;  
6 the only issue is whether alleged failure to adequately disclose  
7 the risk of negative amortization is a "material" disclosure for  
8 purposes of the extended three-year statute of limitations for  
9 rescission.

10 Regulation Z provides that "[t]he term 'material disclosures'  
11 means the required disclosures of the annual percentage rate, the  
12 finance charge, the amount financed, the total payments, the  
13 payment schedule, and the disclosures and limitations referred to  
14 in § 226.32(c) and (d)." 12 C.F.R. § 226.23(a)(3) n.48. The  
15 Commentary to this regulation states that only one of the required  
16 disclosures regarding variable-rate loans -- that the transaction  
17 contains a variable-rate feature -- is considered "material" such  
18 that it triggers the extended rescission period:

19 Footnote 48 sets forth the material disclosures that  
20 must be provided before the rescission period can  
21 begin to run. Failure to provide information  
22 regarding the annual percentage rate also includes  
23 failure to inform the consumer of the existence of a  
variable rate feature. Failure to give the other  
required disclosures does not prevent the running of  
the rescission period, although that failure may  
result in civil liability or administrative sanctions.

24 12 C.F.R. Pt. 226, Supp. I ¶ 23(a)(3)-2

25 Here, the loan documents disclosed that Plaintiff's loan  
26 contained a variable-rate feature. Plaintiff's TILDS provides:  
27 "VARIABLE RATE FEATURE: Your loan contains a variable-rate feature.  
28 Disclosures about the variable rate feature have been provided to

1 you earlier." The TILDS also disclosed an APR of 7.561%, a  
2 \$658,011.43 finance charge, and total payments of \$1,017,752.53, as  
3 well as a payment schedule detailing that 302 payments of \$3,080.08  
4 begin on April 1, 2011. There can be no dispute that the loan  
5 originator/broker disclosed to Plaintiff that her loan contained a  
6 variable-rate feature, that her financing charge was over \$650,000,  
7 and that her monthly payment would substantially increase over the  
8 life of the loan.

9 Aurora observes that the "Adjustable Rate Rider" and the  
10 "Adjustable Rate Note" also detail the variable-rate feature of the  
11 loan and how unpaid principal might increase. The Adjustable Rate  
12 Rider, signed by Plaintiff and attached to the Deed of Trust,  
13 explained that the Note's interest rates were keyed to market  
14 fluctuations and directly affected the loan's principal:

15 THIS NOTE CONTAINS PROVISIONS THAT WILL CHANGE THE  
16 INTEREST AND THE MONTHLY PAYMENT. THERE MAY BE A  
17 LIMIT ON THE AMOUNT THAT THE MONTHLY PAYMENT CAN  
18 INCREASE OR DECREASE. THE PRINCIPAL AMOUNT TO REPAY  
19 COULD BE GREATER THAN THE AMOUNT ORIGINALLY BORROWED  
20 [.....]

21 (Compl., Ex. 1.)

22 The Adjustable Rate Note also disclosed how the unpaid  
23 principal might increase:

24 (E) Additions to My Unpaid Principal: Since my  
25 monthly payment amount changes less frequently than  
26 the interest rate, and since the monthly payment is  
27 subject to the payment limitations discussed in  
28 Section 3(D), my Minimum Payment could be less than or  
greater than the amount of the interest portion of the  
monthly payment that would be sufficient to repay the  
unpaid Principal I owe at the monthly payment date in  
full on the Maturity Date in substantially equal  
payments. For each month that my monthly payment is  
less than the interest portion, the Note Holder will  
subtract the amount of my monthly payment from the  
amount of the interest portion, and will add the

1 difference to my unpaid Principal[.]  
2 (RJN, Doc. 10, Ex. 1.)

3 Additionally, the "ARM Disclosure Statement" in Plaintiff's  
4 Loan Origination File explained that: "If you pay an amount less  
5 than the full payment that would not be sufficient to cover the  
6 interest due, the difference will be added to your loan amount.  
7 This means that the balance of your loan could increase. This is  
8 known as *negative amortization*." (RJN, Doc. 10, Ex. 5.) (emphasis  
9 added).

10 Plaintiff's complaint and opposition cite to 12 C.F.R. §  
11 226.19 in support of the argument that "the Truth in Lending  
12 Disclosure Statement must include specific explanations of ...  
13 negative amortization." (Compl. § 17.) While 12 C.F.R. §  
14 226.19(b) does require disclosures for certain variable rate  
15 transactions, it states only that such disclosures "must be  
16 provided at the time an application form is provided or before the  
17 consumer pays a non-refundable fee, whichever is earlier." It does  
18 not require such disclosures to be made in the Truth in Lending  
19 Disclosure Statement itself.<sup>5</sup> Plaintiff also cites in support of  
20 this assertion "Federal Reserve Board Official Staff Commentary,  
21 [Regulation Z; Docket No. R-08631] Monday, April 3, 1995."  
22 However, this document states no such requirement.

23 Plaintiff's primary argument in support of her first claim is  
24 that rescission is appropriate simply because 12 C.F.R. § 226.19  
25 requires the loan to disclose the possibility of negative  
26

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27 <sup>5</sup> As part of her Loan Origination Package Plaintiff signed the  
28 ARM Disclosure Statement explaining the mechanics of negative  
amortization. (See RJN, Doc. 10, Ex. 5.)

1 amortization. Applying Plaintiff's reasoning, 12 C.F.R. § 226.19  
2 governs whether the three-year statute of limitations for  
3 rescission is extended, not 12 C.F.R. § 226.23(a)(3). This is  
4 incorrect. Plaintiff's legal basis for rescission is inconsistent  
5 with the statutory language of TILA, as well as Ninth Circuit  
6 authority. See *Meyer v. Ameriquest Mortg. Co.*, 342 F.3d 899, 902  
7 (9th Cir. 2003) (citing 12 CFR § 226.23(a)(3) for the proposition  
8 that "[i]f the required notice or material disclosures are not  
9 delivered, the right to rescind shall expire 3 years after  
10 consummation..."); *Jackson v. Grant*, 890 F.2d 118, 120 (9th Cir.  
11 1989) ("Th[e] right of rescission is further explained in Section  
12 226.23(a)(3) of Regulation Z of the Federal Reserve Board.").

13 Plaintiff's legal analysis appears to incorporate language  
14 from the holdings of *Plascencia v. Lending 1st Mortg.*, No. C-  
15 07-4485-CW, 2008 WL 1902698 (N.D. Cal. Apr. 28, 2008), *Ralston v.*  
16 *Mortgage Investors Group, Inc.*, No. C-08-536-JF, 2009 WL 688858  
17 (N.D. Cal. Mar. 16, 2009), and *O'Donnell v. Bank of America*, No.  
18 C-07-04500-RMW, 2009 WL 765670 (N.D. Cal. Mar. 20, 2009), three  
19 cases "recogniz[ing] the viability of claims for failure clearly  
20 and conspicuously to disclose the certainty of negative  
21 amortization." However, the TILA deficiency claims in *Plascencia*,  
22 *Ralston*, and *O'Donnell* involved prayers for damages under TILA  
23 (applying the one-year limitation period), not rescission (applying  
24 the three-year limitation period). *Plascencia*, *Ralston*, and  
25 *O'Donnell* never addressed the issue of "materiality" under §  
26 226.23(a)(3) and are not helpful to Plaintiff's claim for  
27 rescission.

28 Conversely, cases analyzing § 226.23(a)(3)'s materiality

1 provisions universally hold that a plaintiff is not "entitled to  
2 rescind his loan transaction due to defendants' alleged failure to  
3 disclose the risk of negative amortization." See *Chetal v.*  
4 *American Home Mortg.*, No. C-09-02727-CRB, 2009 WL 2612312 (N.D.  
5 Cal. Aug. 24, 2009) ("Plaintiff has not demonstrated that the loan  
6 papers failed to disclose the loan's negative amortization  
7 potential [...] Plaintiff cites to no cases in which similar  
8 disclosures have been found inadequate."); *Jordan v. Paul Fin.,*  
9 *LLC*, --- F. Supp. 2d ---, 2009 WL 1941561 (N.D. Cal. 2009)  
10 ("Plaintiff is not entitled to rescind his loan transaction due to  
11 defendants' alleged failure to disclose the risk of negative  
12 amortization."); *Mandrigues v. World Savings, Inc.*, No. C-07-4497-  
13 JF, 2009 WL 160213 (N.D. Cal., Jan. 20, 2009) ("[E]ven if  
14 Plaintiffs were to succeed in showing that Defendants failed to  
15 provide adequate disclosures of negative amortization, it appears  
16 that this failure would not trigger a right of rescission."); see  
17 also *McCutcheon v. America's Servicing Co.*, 560 F.3d 143, 150, n.6  
18 (3rd Cir. 2009) (same). Much like her omission to discuss 12  
19 C.F.R. § 226.23(a)(3)'s "materiality" requirements, Plaintiff does  
20 not address these cases in her opposition.

21 In *Jordan v. Paul Financial, LLC*, Plaintiff Jordan filed a  
22 putative class action complaint against defendant lenders and  
23 brokers. Plaintiff contended that rescission under TILA was  
24 available as a remedy for defendants' alleged failure to disclose  
25 the risk of negative amortization. 2009 WL 1941561 at \*1.  
26 Defendants moved for summary judgment on Plaintiff's claim for  
27 rescission. Examining a note similar to Plaintiff's "Adjustable  
28 Rate Note," Judge Illston of the Northern District held that



1 alleged failure to adequately disclose the risk of negative  
2 amortization is not a material disclosure and "there is no dispute  
3 that Paul Financial disclosed to plaintiff that his loan contained  
4 a variable-rate feature." *Id.* at \*6-7. "[E]ven if plaintiff is  
5 correct that defendants otherwise violated TILA by failing to  
6 adequately disclose the risk of negative amortization, such a  
7 violation is not 'material' and does not entitle plaintiff to the  
8 extended three-year statute of limitations for rescission of the  
9 loan." *Id.* at \*7.

10 In this case, like *Jordan*, there is no dispute that the loan  
11 originator and broker disclosed to Plaintiff that her loan  
12 contained a variable-rate feature. Notice of the adjusted-rate  
13 features of the loan satisfies § 226.23(a)(3) and ends the  
14 "materiality" inquiry. *Id.* Even assuming, *arguendo*, that  
15 Defendants otherwise violated TILA by failing to adequately  
16 disclose the risk of negative amortization, which is not true, such  
17 a violation is not "material" and does not entitle Plaintiff to the  
18 extended three-year statute of limitations for rescission of the  
19 loan. *See McCutcheon*, 560 F.3d at 150, n.6 ("Even if [Defendant]  
20 had failed to send the pre-closing variable-rate disclosures  
21 [Plaintiff] would not be entitled to rescind the mortgage at this  
22 time [...] TILA provides an extended three-year rescission period  
23 only where the mortgagee did not provide material disclosures [...] The only required  
24 "material disclosures with respect to the  
25 variable-rate nature of the mortgage are a notification that the  
26 interest rate and monthly payment may increase and the amount of  
27 the single maximum monthly payment, and [Plaintiff] does not deny  
28 receiving that information.").

1 Consistent with § 226.23(a)(3) and the *Jordan*, *Mandrigues*,  
2 *Chetal*, and *McCutcheon* cases, Plaintiff is not entitled to rescind  
3 her loan transaction due to the alleged failure to disclose the  
4 risk of negative amortization. Because Plaintiff has failed to  
5 identify a TILA violation as to the disclosure of negative  
6 amortization, she has failed to demonstrate a right to rescind the  
7 loan within three years, instead of the standard three days.  
8 Plaintiff's first cause of action for rescission under TILA is  
9 DISMISSED WITH PREJUDICE.

10  
11 **B. State Law Claims (Counts II-III)**

12 Plaintiff's complaint also advances supplemental state law  
13 claims for financial elder abuse and a violation of California  
14 Business & Professions Code § 7200. However, as stated above, the  
15 motion to dismiss is granted with respect to the TILA claim - the  
16 only federal claim - in Plaintiff's Complaint.<sup>6</sup> Having determined  
17 that Plaintiff's TILA claim is time-barred, supplemental  
18 jurisdiction will not be exercised over Plaintiff's remaining state  
19 law claims. No judicial resources have been spent on analyzing the  
20 merits of such claims, and they raise issues of state law which  
21 California state courts can readily address.

22 Under 28 U.S.C. § 1367(c)(3), a district court may decline to  
23

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24 <sup>6</sup> Defendants satisfied § 226.23(a)(3)'s "materiality"  
25 requirement by providing notice of the adjusted-rate features of  
26 the loan. The loan also included the terms of the loan (e.g.,  
27 7.561% APR), the financing charge (over \$600,000), and the monthly  
28 payment schedule (e.g., 302 payments of \$3,080.08 beginning on  
April 1, 2011). Plaintiff has not demonstrated a right to rescind  
the loan within three years, instead of the standard three days.  
Plaintiff's TILA claim is DISMISSED.

1 exercise supplemental jurisdiction over a claim if the court has  
2 dismissed all claims over which it has original jurisdiction.  
3 *Brown v. Lucky Stores*, 246 F.3d 1182, 1189 (9th Cir. 2001). The  
4 decision to retain jurisdiction over state law claims is within the  
5 discretion of the district court, weighing factors such as economy,  
6 convenience, fairness, and comity. *Brady v. Brown*, 51 F.3d 810,  
7 816 (9th Cir. 1995) (citing *Imagineering, Inc. v. Kiewit Pac. Co.*,  
8 976 F.2d 1303, 1309 (9th Cir. 1992), cert. denied, 507 U.S. 1004  
9 (1993)). Because this case is at an early stage, there is no  
10 federal interest in purely local claims, and the state courts are  
11 better equipped to deal with matter of state law. There is no  
12 reason to exercise supplemental jurisdiction over Plaintiff's  
13 remaining state law claims. See *Imagineering*, 976 F.3d at 1309  
14 (when all federal claims are dismissed before trial, the balance of  
15 factors points toward declining to exercise jurisdiction over  
16 remaining state law claims) (citations omitted). Plaintiff's  
17 supplemental state claims for financial elder abuse and unfair  
18 competition are dismissed without prejudice to refiling in state  
19 court.

## 20 21 VI. CONCLUSION

22 For the reasons stated:

23 (1) Plaintiff's first cause of action for rescission under  
24 TILA is time-barred and DISMISSED WITH PREJUDICE.

25 (2) Plaintiff's supplemental state law causes of action for  
26 financial elder abuse and unfair competition are DISMISSED WITHOUT  
27 PREJUDICE to refiling in state court.

28 Defendant Aurora shall submit a form of order consistent with,

1 and within five (5) days following electronic service of, this  
2 memorandum decision.

3  
4 IT IS SO ORDERED.

5 **Dated: November 9, 2009**

**/s/ Oliver W. Wanger**  
**UNITED STATES DISTRICT JUDGE**